Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

CENTRAL STATE UNIVERSITY,
Petitioner,

v.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY CHAPTER, APPELLEE AND CROSS-APPELLANT, v. CENTRAL STATE UNIVERSITY, APPELLANT AND CROSS-APPELLEE.

No. 97-568

SUPREME COURT OF OHIO

83 Ohio St. 3d 229; 699 N.E.2d 463; 1998 Ohio LEXIS 2514; 159 L.R.R.M. 2424

September 30, 1998, Decided

PRIOR HISTORY: APPEAL and CROSS-APPEAL from the Court of Appeals for Greene County, No. 96-CA-21.

Plaintiff-appellee and cross-appellant, American Association of University Professors, Central State University Chapter ("AAUP"), is the certified collective bargaining agent for full-time faculty members at defendant-appellant and cross-appellee, Central State University ("CSU"). AAUP and CSU have engaged in collective bargaining since 1985. Their most recent agreement was effective September 1, 1991 through August 31, 1994. Article 19 of that agreement governed faculty workload and provided, among other things, that the "normal full-time workload will be twelve (12) contact hours per quarter," and that "if a Bargaining Unit member teaches more than twelve (12) contact hours * * *, then the additional hours will be considered as an overload" entitling the member, at his or her option, to either "overload compensation" or "the equivalent in release time in a

subsequent quarter." It also provided that "bargaining unit members will have at least eight (8) posted office hours per week and will be available for additional hours by appointment."

At the time the parties entered into this agreement, the provisions governing faculty workload were appropriate subjects for collective bargaining under R.C. 4117.08(A), and binding on the parties under R.C. 4117.10(A). However, while the agreement was in effect, the General Assembly enacted R.C. 3345.45 as part of Am.Sub.H.B. No. 152, 145 Ohio Laws, Part II, 3767. R.C. 3345.45, effective July 1, 1993, provides as follows:

> "On or before January 1, 1994, the Ohio board of regents jointly with all state universities, as defined in section 3345.011 of the Revised Code, shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for institutions to determine a range of acceptable undergraduate teaching by faculty.
>
> "On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section are not appropriate subjects for collective bargaining. Notwithstanding division (A) of section 4117.10 of the Revised Code, any policy

> adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees." (Emphasis added.)

Also enacted as part of Am.Sub.H.B. No. 152, Section 84.14, uncodified, provides:

> "Pursuant to section 3345.45 of the Revised Code, the Ohio Board of Regents shall work with state universities to ensure that no later than fall term 1994 a minimum ten per cent increase in statewide undergraduate teaching activity be achieved to restore the reductions experienced over the past decade. Notwithstanding section 3345.45 of the Revised Code, any collective bargaining agreement in effect on the effective date of this act shall continue in effect until its expiration date." (Emphasis added.) 145 Ohio Laws, Part III, 4539.

On April 15, 1994, AAUP and CSU began negotiations for a successor agreement. On June 16, 1994, CSU unilaterally adopted a new workload policy pursuant to R.C. 3345.45, which it later amended in November 1994. That policy, as amended, provides:

> "The normal full-time teaching load will be a range of 36 to 40 contact hours per academic year. The normal teaching load in any quarter will not exceed 15 contact hours. Faculty members shall have at least ten office hours distributed over the five day work week."

On July 28, 1994, CSU notified AAUP that it would not bargain over the issue of faculty workload, "as faculty workload is no longer subject to the collective bargaining process as a result of House Bill 152." However, the parties entered into an agreement on December 14, 1994, as follows:

> "In the event that a court of competent jurisdiction rules that O.R.C. 3345.45 is unconstitutional, or otherwise finds that the University and AAUP must or can bargain concerning faculty workload, the provisions of this article [Article 19] shall be reopened, and the University and AAUP shall commence negotiations concerning faculty workload."

Meanwhile, the parties continued to operate under the terms and conditions of the 1991-1994 agreement while bargaining on issues other than workload.

On May 17, 1995, AAUP filed a complaint for declaratory judgment and injunctive relief, and a motion for a preliminary injunction pursuant to Civ.R. 65(B), alleging that R.C. 3345.45 violates the Equal Protection Clauses of the Ohio and United States Constitutions, and Section 1, Article I of the Ohio Constitution. The trial court ordered trial on the merits of the action to be advanced and consolidated with the hearing on the application for preliminary injunction, in accordance with Civ.R. 65(B)(2).

Following an evidentiary hearing, the trial court denied AAUP's requests for declaratory judgment and injunctive relief, and held R.C. 3345.45 to be constitutional in its entirety. In so doing, the court found:

> "The legislature had a legitimate governmental purpose in the enactment of

> Ohio Revised Code Section 3345.45. The legitimate governmental purpose is to recapture the ten (10%) percent decline in teaching that had occurred in undergraduate teaching in State four (4) year universities, thereby enhancing the quality of undergraduate education at four (4) year State institutions. Another legitimate governmental purpose is to reallocate faculty attention to teaching and away from research. The legislative purpose also was to ensure that all State four (4) year universities uniformly implement workload policy consistent with the universities' mission.
>
> "The collective bargaining language contained in Ohio Revised Code Section 3345.45 represents a legitimate governmental purpose as it enables the legislature to ensure that the ten (10%) percent decline will be recaptured uniformly by departments with the state universities consistent with each university's individual mission.
>
> "Ohio Revised Code Section 3345.45 bears a rational relationship to the legitimate government purpose. Ohio Revised Code 3345.45 requires the State universities to implement workload policies designed to recapture the ten (10%) percent decline in instructional teaching. The collective bargaining provision contained in Ohio Revised Code Section 3345.45 ensures that each University will implement the workload policy consistent with the statute."

The court of appeals reversed the decision of the trial court. In so doing, the appellate court found that the right to collectively bargain is a fundamental right, and that the trial court should have employed "intermediate scrutiny, "rather than the "rational relationship" test, in order to resolve the equal protection issue. However, the court of appeals did not determine whether R.C. 3345.45 runs afoul of equal protection, but instead remanded the cause to the trial court to determine whether the statute serves "important governmental objectives" and whether the classification contained therein is "substantially related to the achievement of those objectives."

The cause is now before this court pursuant to the allowance of a discretionary appeal and cross-appeal.

R.C. 3345.45 violates the Equal Protection Clauses of the Ohio and United States Constitutions since the classification contained therein bears no rational relationship to a legitimate governmental interest.

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Betty D. Montgomery, Attorney General, and Lawrence J. Miltner, Assistant Attorney General, for amicus curiae Ohio Board of Regents.

JUDGES: ALICE ROBIE RESNICK, J. F.E. SWEENEY and PFEIFER, JJ., concur. DOUGLAS, J., concurs in the syllabus and judgment. MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

ALICE ROBIE RESNICK, J. The primary issue confronting the court today is whether R.C. 3345.45 violates the Equal Protection Clauses of the Ohio and United States Constitutions. CSU challenges the court of appeals' determination that collective bargaining is a fundamental right and its application of a heightened level of equal protection scrutiny. Although AAUP seeks to defend the reasoning of the court of appeals, its primary focus is on arguing that the rationales advanced in support of R.C. 3345.45 cannot withstand any level of equal protection scrutiny. For the following reasons, we hold that both appeals have merit.

The Fourteenth Amendment to the United States Constitution provides that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Section 2, Article I of the Ohio Constitution provides that "all political power is inherent in the people. Government is instituted for their equal protection and benefit * * * ." These two provisions are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law. *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.* (1986), 22 Ohio St. 3d 1, 6, 22 Ohio B. Rep. 1, 5, 488 N.E.2d 181, 185; *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St. 3d 351, 353, 639 N.E.2d 31, 33. Accordingly, we will consider the propriety of R.C. 3345.45 under both of these constitutional provisions as a single question.

The standards for determining whether a law runs afoul of equal protection generally involve identifying the

means and ends of the law at issue and examining the relationship between them. If the means employed by the law at issue create separate classes of persons who receive different treatment, the laws will be tested under the equal protection guarantee. Otherwise, if no distinctions are drawn and no classifications are created, there is no reason to subject the law to equal protection scrutiny. See *State ex rel. Doersam v. Indus. Comm.* (1989), 45 Ohio St. 3d 115, 120, 543 N.E.2d 1169, 1174; *State v. Thompkins* (1996), 75 Ohio St. 3d 558, 561, 664 N.E.2d 926, 929.

There is no question that R.C. 3345.45 legislatively creates discrete classes of persons who receive differential treatment. The statute isolates university faculty members as the only public employees as defined in R.C. 4117.01(C) who are precluded from collectively bargaining over their workload.

However, the mere fact that R.C. 3345.45 creates separate classes of persons does not render it suspect under the Equal Protection Clause. "The demand for 'equal protection' cannot be a demand that laws apply universally to all persons. By the very nature of the work of the legislature, it must, if it is to act at all, impose special burdens upon or grant special benefits to special groups or classes of individuals." *Doersam, supra*, 45 Ohio St. 3d at 119, 543 N.E.2d at 1173. Instead, the fact of classification serves only to subject the statute to equal protection scrutiny, that is, whether the classification created bears "a sufficient relationship to a required governmental purpose." *Id.*, 45 Ohio St. 3d at 120, 543 N.E.2d at 1174.

Generally, "[a] statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio Constitution if the classification is rationally related to a legitimate

governmental interest." *Klepper v. Ohio Bd. of Regents* (1991), 59 Ohio St. 3d 131, 133, 570 N.E.2d 1124, 1127. In other words, "where neither a fundamental right nor a suspect class is involved, a legislative classification passes muster if the state can show a rational basis for the unequal treatment of different groups." *Fabrey, supra*, 70 Ohio St. 3d at 353, 639 N.E.2d at 33.

R.C. 3345.45 involves neither a suspect class nor a fundamental right. Although the court of appeals raised forceful arguments as to the value and importance of collective bargaining in Ohio, no authority of which we are aware has held the right of public employees to collectively bargain over their workload to be a fundamental right for equal protection purposes.

In an effort to defend the court of appeals' analysis, AAUP claims that this court applied a heightened level of scrutiny to a statute denying certain Dayton municipal employees the collective bargaining rights enjoyed by other similarly situated municipal employees in *State ex rel. Dayton Fraternal Order of Police Lodge No. 44, supra*. AAUP argues that by framing the issue to be whether the Dayton exclusion "bears a fair and substantial relation to the object of the Public Employees Collective Bargaining Act," we actually applied an intermediate level of scrutiny. 22 Ohio St. 3d at 6, 22 Ohio B. Rep. at 5, 488 N.E.2d at 186. However, our focus in that case was clearly on whether the created classification was "rationally related to a legitimate government interest." (Emphasis added.) *Id.*, 22 Ohio St. 3d at 6, 22 Ohio B. Rep. at 5, 488 N.E.2d at 185. At no point did we hold the right of collective bargaining to be a fundamental right or apply a heightened or intermediate level of equal protection scrutiny.

The determinative issue in this case is, therefore, whether R.C. 3345.45 bears a rational relation to a legitimate

governmental interest. In considering this issue, we are guided by the principles that all legislative enactments enjoy a strong presumption of constitutionality and that, under rational-basis scrutiny, a legislative distinction will be upheld if there exists any conceivable set of facts to justify it. See *Fabrey, supra*, 70 Ohio St. 3d at 352-353, 639 N.E.2d at 33; *Denicola v. Providence Hosp.* (1979), 57 Ohio St. 2d 115, 119, 11 Ohio Op. 3d 290, 293, 387 N.E.2d 231, 234.

The goal of R.C. 3345.45, as set forth in Section 84.14 of Am.Sub.H.B. No. 152, is "to ensure that no later than fall term 1994, a minimum ten percent increase in statewide undergraduate teaching activity be achieved to restore the reductions experienced over the past decade." The record suggests, and the parties agree, that the object of this legislation is not to increase total faculty workload, but to effect a change in the ratio between faculty activities in order to correct the imbalance between research and teaching at four-year undergraduate state institutions created by a faculty reward system which prizes research over teaching. Intrinsically, this is a concern over the quality of undergraduate education and, therefore, is a legitimate governmental interest.

The fact that the General Assembly chose to correct only the decline in teaching-related activity at this time, rather than attempt to address all at once the various factors that the record suggests have contributed to the instability of higher education in Ohio, does not diminish the legitimacy of its interest. "It is generally recognized that when a legislative body chooses to act to correct a given evil it need not correct all the evil at once, but it may proceed step-by-step." *State v. Buckley* (1968), 16 Ohio St. 2d 128, 134, 45 Ohio Op. 2d 469, 473, 243 N.E.2d 66, 71.

However, the existence of a legitimate governmental interest will not enable the legislative classification to pass constitutional muster if the party attacking the legislation can show that there is no rational basis for the differential treatment. Many of the arguments advanced by CSU and its supporting amicus curiae, Ohio Board of Regents, seek to establish a general relationship between faculty workload and quality of education, or to justify treating differently the faculty at two- and four-year institutions. Such arguments, however, miss the mark, as they fail to address the essential question of whether there exists a rational basis for placing faculty members in a class by themselves as the only public employees as defined in R.C. 4117.01(C) denied the right to collectively bargain over their workload.

On this precise issue, CSU and the Ohio Board of Regents argue that in order to recoup the ten-percent decline in teaching, it is necessary to achieve uniformity, consistency, and equity in terms of faculty workload by university mission, and that collective bargaining produces considerable variation in faculty workload across the universities in departments having the same academic mission. In support of its position, CSU submitted as evidence to the trial court the following reports published prior and subsequent to the enactment of R.C. 3345.45: Report, Legislative Office of Education Oversight, The Faculty Reward System in Public Universities (July 1993); Report of the Managing for the Future Task Force, Challenges & Opportunities for Higher Education in Ohio (July 1992); Report of the Regents' Advisory Committee on Faculty Workload Standards & Guidelines (Feb. 18, 1994); Report of the Regents' Advisory Committee on Faculty Workload, The Evaluation & Reward of Teaching (June 1994); A Report of the Ohio Board of Regents, Securing the Future of Higher Education in Ohio (Dec. 1992); and the Basic Data Series, a biennial publication of

tables reflecting statistical data collected from Ohio colleges and universities.

We have reviewed each of these reports, and all other evidence contained in the record, and can conclude with confidence that there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching. Indeed, these reports appear to indicate that factors other than collective bargaining are responsible for the decline in teaching activity.

The Legislative Office of Education Oversight Report, supra, at 12, explains as follows:

> "FACTORS CONTRIBUTING TO IMBALANCE
>
> "The imbalance of research over teaching and service in the faculty reward system is due to a combination of three factors, and their effects on one another. These factors are embedded in the process of granting promotions and tenure to faculty at four-year institutions throughout the country. They include:
>
> "1. A national competition among universities for prestige, funds, faculty, and students;
>
> "2. The perceived difficulty of assessing faculty work other than research; and

> "3. The nationwide culture of universities."

The Report of the Managing for the Future Task Force explains:

> "In Ohio, over the past ten years faculty time devoted to teaching and student advising has decreased somewhat, while time devoted to research has increased * * * . Faculty course sections assigned each term have not changed in the aggregate, but the average 'student credit hours taught' (credit hour value of the course times the number of students enrolled in the course) has decreased by 10% * * * . This would indicate either that faculty are teaching courses with fewer students than in the past and/or they are spending their time on the research and service contributions that make up the balance of their work assignment." *Id.* at 40.

The Report goes on to list a number of priorities and to make recommendations under each priority. "Priority 3" is entitled "Increase Productivity and Reduce Costs." *Id.* at 54. Under this priority, the Task Force seeks in part to "ensure that faculty time is allocated in the most productive manner, consistent with institutional and departmental missions," and to accomplish this by having the Ohio Board of Regents require each public college and university to "develop an institutional faculty performance workload policy," and "develop and implement a faculty performance evaluation and appropriate reward system consistent with institutional mission, goals and objectives." *Id.* at 55.

Although these concerns are strikingly similar to the arguments made by CSU and the Ohio Board of Regents, the

Report itself does not support the elimination of collective bargaining rights in order to achieve consistency and uniformity. To the contrary, the Task Force specifically recommended under this priority an assurance that "the rights of employees to bargain collectively are protected." *Id.* at 56.

The 1990 Basic Data Series indicates that teaching workload, at least in terms of average "credit hours assigned" and average "weekly contact hours" is generally higher at state universities where collective bargaining has occurred than at other universities. Indeed, the Legislative Office of Education Oversight Report, supra, at 10, indicates that "71 percent of faculty report their interests lean toward or lay primarily in teaching," that "78 percent of these professors [regarding research as essential for tenure] would prefer teaching to be essential for tenure," and that "44 percent of faculty at public institutions felt that demands for research interfered with teaching."

In addition, Dr. Howard L. Gauthier, Executive Associate to the Chancellor for Planning of the Ohio Board of Regents and author of the Regents' Report, testified as follows:

> "Q. * * * I have gone through your report and response to that report, * * * and I couldn't find any recommendation in there on behalf of the Board of Regents that faculty not be allowed to bargain about their workload?
>
> "A. That's correct.
>
> "Q. And in fact I found absolutely no reports anywhere in the exhibits that have been offered by the State that suggest before July 1, 1993, that faculty not be allowed to bargain about their workload. Are you aware of any reports to that affect [sic]?
>
> "A. I'm not.
>
> " * * *
>
> "Q. And I take it that you have done no other study either before or after the enactment of Section 3345.45 that suggested that somehow or another collective bargaining caused a reduction in any workload by faculty?
>
> "A. That's correct."

In light of the foregoing, we cannot find any rational basis for singling out university faculty members as the only public employees as defined in R.C. 4117.01(C) precluded from bargaining over their workload. Accordingly, we hold that R.C. 3345.45 violates the Equal Protection Clauses of the Ohio and United States Constitutions, since the classification contained therein bears no rational relationship to a legitimate governmental interest. We find further that, in light of this holding, it is unnecessary to address AAUP's remaining arguments.

In light of all the foregoing, we conclude that AAUP is entitled to the declaratory judgment and injunctive relief that it has requested.

Judgment accordingly.

F.E. SWEENEY and PFEIFER, JJ., concur.

DOUGLAS, J., concurs in the syllabus and judgment.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

COOK, J., dissenting. Because I believe that a rational basis underlies R.C. 3345.45, I respectfully dissent.

I agree with the majority that collective bargaining does not rise to the level of a fundamental right and, therefore, the proper inquiry in this case is whether R.C. 3345.45 bears a rational relation to a legitimate government interest. I depart, however, from the majority's ultimate conclusion that R.C. 3345.45 fails rational-basis scrutiny.

R.C. 3345.45 represents a legislative response to a decade-long trend of declining teaching activity at four-year undergraduate state institutions in favor of research. Am.Sub.H.B. No. 152, Section 84.14, uncodified, 145 Ohio Laws, Part III, 4539. As noted by the majority, "The record suggests, and the parties agree, that the object of this legislation is not to increase total faculty workload, but to effect a change in the ratio between faculty activities in order to correct the imbalance between research and teaching at four-year undergraduate state institutions created by a faculty reward system which prizes research over teaching."

The majority recognizes that R.C. 3345.45 is aimed at a legitimate government interest -- the quality of undergraduate education. Nevertheless, it concludes that the statute violates the Equal Protection Clauses of our state and federal Constitutions because its means do not legitimately relate to its desired end. The majority supports its position by stating that "there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching."

As I explain later in this dissent, however, that collective bargaining has not caused the decline in teaching proves nothing in assessing whether the faculty workload standards imposed pursuant to R.C. 3345.45 legitimately relate to that statute's purpose of restoring losses in undergraduate teaching activity.

Initially, it is important to recognize the strong presumption of validity in favor of legislative classifications that do not involve fundamental rights or suspect classifications. See, *e.g.*, *Fed. Communications Comm. v. Beach Communications, Inc.* (1993), 508 U.S. 307, 314-315, 113 S. Ct. 2096, 2101-2102, 124 L. Ed. 2d 211, 222; *Kadrmas v. Dickinson Pub. Schools* (1988), 487 U.S. 450, 462, 108 S. Ct. 2481, 2489, 101 L. Ed. 2d 399, 412. Rational-basis scrutiny is intended to be a paradigm of judicial restraint, and where there are plausible reasons for the General Assembly's action, a court's inquiry must end. *Beach Communications*, 508 U.S. at 313-314, 113 S. Ct. at 2101, 124 L. Ed. 2d at 221. " 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.' " *Id.*, quoting *Vance v. Bradley* (1979), 440 U.S. 93, 97, 99 S. Ct. 939, 942-943, 59 L. Ed. 2d 171, 176.

Accordingly, to enact legislation that can withstand an equal protection challenge proceeding under rational-basis scrutiny, a legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification.' *Nordlinger [v. Hahn* (1992)], supra, [505 U.S. 1] at 15 [505 U.S. 1, 112 S. Ct. 2326, 2334, 120 L. Ed. 2d 1, 16]. See also, *e.g.*, *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 [101 S. Ct. 453, 461, 66 L. Ed. 2d 368, 378] (1980); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522,

528 [79 S. Ct. 437, 441, 3 L. Ed. 2d 480, 486] (1959). Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' *Beach Communications, supra*, [508 U.S.] at 313 [113 S. Ct. at 2101, 124 L. Ed. 2d at 221]. See also, *e.g., Nordlinger, supra*, [505 U.S.] at 11 [112 S. Ct. at 2334, 120 L. Ed. 2d at 13]; *Sullivan v. Stroop*, 496 U.S. 478, 485 [110 S. Ct. 2499, 2504, 110 L. Ed. 2d 438, 446] (1990); *Fritz, supra*, [449 U.S.] at 174-179 [101 S. Ct. at 459-461, 66 L. Ed. 2d at 375-379]; *Vance v. Bradley*, 440 U.S. 93, 111 [99 S. Ct. 939, 949, 59 L. Ed. 2d 171, 184] (1979); *Dandridge v. Williams* [1970], *supra*, [397 U.S. 471] at 484-485 [397 U.S. 471, 90 S. Ct. 1153, 1161-1162, 25 L. Ed. 2d 491, 501].

"A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' *Beach Communications, supra*, [508 U.S.] at 315 [113 S. Ct. at 2096, 124 L. Ed. 2d at 222]. See also, *e.g., Vance v. Bradley, supra*, [440 U.S.] at 111 [99 S. Ct. at 949, 59 L. Ed. 2d at 184]; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 [96 S. Ct. 2488, 2499, 49 L. Ed. 2d 220, 232-233] (1976); *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 139 [89 S. Ct. 323, 328, 21 L. Ed. 2d 289, 297] (1968). A statute is presumed constitutional, *see supra*, [*Heller v. Doe*, 509 U.S. 312] at 320 [113 S. Ct. 2637 at 2643, 125 [*240] L. Ed. 2d 257 at 270], and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 [93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351, 358] (1973) (internal quotation marks omitted), whether or not the basis has a

foundation in the record." *Heller v. Doe* (1993), 509 U.S. 312, 320-321, 113 S. Ct. 2637, 2642-2643, 125 L. Ed. 2d 257, 270-271.

Based on this standard, the majority does not demonstrate that R.C. 3345.45 is unconstitutional when it says that there is no evidence in the record linking collective bargaining to the decline in teaching, or cites statistical evidence tending to show that university faculty members are more interested in teaching than research and would prefer teaching to be the essential criterion for tenure. Under rational-basis scrutiny, "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, see *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174, 179 [101 S. Ct. 453, 459, 461, 66 L. Ed. 2d 368, 376, 378] (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 [101 S. Ct. 715, 724, 66 L. Ed. 2d 659, 669] (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see *Cleburne v. Cleburne Living Center, Inc.* [1985], 473 U.S. [432], 446 [473 U.S. 432, 105 S. Ct. 3249, 3257, 87 L. Ed. 2d 313, 324]." *Nordlinger v. Hahn* (1992), 505 U.S. 1, 11, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1, 13. Because R.C. 3345.45 concerns a legitimate government interest, the only remaining question is whether the General Assembly rationally could have believed that imposing uniform workload standards would promote its objective. See *W. & S. Life Ins. Co. v. State Bd. of Equalization of California* (1981), 451 U.S. 648, 671, 101 S. Ct. 2070, 2084-2085, 68 L. Ed. 2d 514, 533.

The evidence before the trial court tended to demonstrate that while the current imbalance between

teaching and research is due to factors unrelated to collective bargaining, it is unlikely that the collective bargaining process will bring research and teaching into balance in the absence of legislative intervention. Research provides the primary basis for competition among universities for prestige, funds, faculty, and students. This emphasis on research, in turn, leads teachers to focus their efforts disproportionately on research in hopes of increasing their value to their respective universities and marketability to more prestigious institutions. Accordingly, neither the universities nor the faculty members would seem to have much incentive to bargain for an increase in the ratio of teaching to research.

R.C. 3345.45 requires a joint effort between the board of regents and state universities to "develop standards for instructional workloads," setting a "range of acceptable undergraduate teaching by faculty." It also removes that subject from collective bargaining in order to ensure that the workload standards are implemented consistently.

The majority's concern that collective bargaining did not cause the decline in teaching activity that R.C. 3345.45 seeks to rectify is inconsequential to our rational-basis review. It matters not that the General Assembly fashioned R.C. 3345.45 to treat an undesirable symptom rather than to eliminate its cause. " 'The legislature may select one phase of one field and apply a remedy there, neglecting the others.' " *Beach Communications*, 508 U.S. at 316, 113 S. Ct. at 2102, 124 L. Ed. 2d at 223, quoting *Williamson v. Lee Optical of Oklahoma, Inc.* (1955), 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, 573. Instead, once we have determined that the General Assembly acted with a legitimate government interest in mind, rational-basis scrutiny requires that we look only to the legislative action taken and determine whether it is arbitrary or irrational.

"Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it ' "is not made with mathematical nicety or because in practice it results in some inequality." ' *Dandridge v. Williams, supra*, [397 U.S.] at 485 [90 S. Ct. at 1161, 25 L. Ed. 2d at 501-502], quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S. Ct. 337, 340, 55 L. Ed. 369, 377] (1911). 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 [33 S. Ct. 441, 443, 57 L. Ed. 730, 734] (1913). See also, *e.g., Burlington Northern R. Co. v. Ford*, 504 U.S. 648, 651 [112 S. Ct. 2184, 2187, 119 L. Ed. 2d 432, 438] (1992); *Vance v. Bradley, supra*, [440 U.S.] at 108 [99 S. Ct. at 948, 59 L. Ed. 2d at 183] and n. 26; *New Orleans v. Dukes, supra*, [427 U.S. 297] at 303 [96 S. Ct. 2513 at 2516, 49 L. Ed. 2d 511 at 517]; *Schweiker v. Wilson*, 450 U.S. 221, 234 [101 S. Ct. 1074, 1082, 67 L. Ed. 2d 186, 198] (1981)." *Heller*, 509 U.S. at 321, 113 S. Ct. at 2642-2643, 125 L. Ed. 2d at 271.

The General Assembly's choice to "single out" university faculty as the only class of public employees as defined in R.C. 4117.01(C) who are precluded from collectively bargaining over their workload is not arbitrary. R.C. 3345.45's goal of recovering recent decreases in teaching activity at state universities exclusively relates to the workload of university faculty members, providing a reasonable basis for the classification. Further, imposing uniform workload standards upon university faculty at state four-year institutions is not an irrational means of effecting an increase in teaching activity. In fact, it was probably the most direct means of accomplishing that objective available to the General Assembly.

Based on all of the foregoing, I believe that R.C. 3345.45 is rationally related to a legitimate government interest and must be upheld against today's equal protection challenge. Accordingly, I would reverse the decision of the court of appeals.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing dissenting opinion.

APPENDIX B

IN THE COURT OF APPEALS
FOR GREENE COUNTY, OHIO

AMERICAN ASSOCIATION OF UNIVERISTY PROFESSORS CENTRAL STATE UNIVERSITY CHAPTER :

Plaintiff-Appellant : C.A. CASE NO. 96-CA-21

vs. : T.C. CASE NO. 95-CV-0238

CENTRAL STATE UNIVERSITY :

Defendant-Appellee : FINAL ENTRY

Pursuant to the opinion of this court rendered on the 31st day of January, 1997, the judgment of the trial court is Reversed and the matter is Remanded to the trial court for further proceedings consistent with the opinion. Costs are to be paid as provided in App.R. 24.

S/WILLIAM H. WOLFF, JR., JUDGE

S/MIKE FAIN, JUDGE

S/THOMAS J. GRADY, JUDGE

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IN THE COURT OF APPEALS
FOR GREENE COUNTY, OHIO

AMERICAN ASSOCIATION OF UNIVERISTY PROFESSORS CENTRAL STATE UNIVERSITY CHAPTER :

Plaintiff-Appellant : C.A. CASE NO. 96-CA-21

vs. : T.C. CASE NO. 95-CV-0238

CENTRAL STATE UNIVERSITY :

Defendant-Appellee :

.....

OPINION

Rendered on the 31st day of January, 1997.

.....

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.....

GRADY, J.

Plaintiff American Association of University Professors, Central State University Chapter ("AAUP") appeals from an order that denied its request for a judgment declaring R.C. 3345.45 to be unconstitutional and for an order enjoining the Defendant, Central State University ("CSU"), from implementing a faculty workload policy adopted pursuant to that statute.

AAUP is the certified collective bargaining agent for full-time faculty members at CSU. AAUP and CSU entered into a collective bargaining agreement that was initially effective from September 1, 1991 through August 31, 1994. Article19 of that agreement concerned faculty workload. That article provided that "normal full-time workload will be twelve (12) contact hours per quarter." The article also provided for additional compensation or equivalent "release time "in certain circumstances for faculty members whose

workload exceeded the normal twelve contact hour workload. Finally, the article required that "bargaining unit members will have at least eight (8) posted office hours per week and will be available for additional hours by appointment."

While this agreement was in effect, R.C. 3345.45 was enacted by the General Assembly. That statute, which became effective July 1, 1993, states as follows:

> On or before January 1, 1994, the Ohio Board of regents jointly with all state universities, as defined in section 3345.011 [3345.01.1] of the Revised Code, shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for institutions to determine a range of acceptable undergraduate teaching by faculty. On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. *Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section are not appropriate subjects for collective bargaining. Notwithstanding division (A) of section 4117.10 of the Revised Code, any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees. (Emphasis added.)*

As a part of the bill that enacted R.C. 3345.45, the General Assembly also enacted uncodified legislation as follows:

> Pursuant to section 3345.45 of the Revised Code, the Ohio Board of Regents shall work with state universities to ensure that no later than fall term 1994, a minimum ten per cent increase in statewide undergraduate teaching activity be achieved to restore the reductions experienced over the past decade. *Notwithstanding section 3345.45 of the Revised Code, any collective bargaining agreement in effect on the effective date of this act shall continue in effect until its expiration date. (Emphasis added.)*

Am.Sub. H.B. 152 (1993), at § 84.14.

In compliance with R.C. 3345.45, CSU's Board of Trustees adopted a new workload policy in June of 1994, which was later amended in November of 1994. The new workload policy, as amended, stated:

> The normal full-time teaching load will be a range of 36 to 40 contact hours per academic year. The normal teaching load in any quarter will not exceed 15 contact hours. Faculty members shall have at least ten office hours distributed over the five day work week.

In 1994, AAUP and CSU began negotiations toward a new collective bargaining agreement. In the course of those negotiations, CSU informed AAUP that it would not bargain on the issue of faculty workload in view of R.C. 3345.45. AAUP and CSU later entered into an agreement that would

allow the issue of faculty workload to be reopened in the event of a court ruling that R.C. 3345.45 was unconstitutional.

In May of 1995, AAUP filed a Complaint for Declaratory Judgment and Injunctive Relief against CSU. AAUP alleged that R.C. 3345.45 violated the equal protection clauses of the United States and Ohio Constitutions, and also violated Ohio constitutional provisions guaranteeing the right to enter into contracts. AAUP sought a judgment declaring R.C. 3345.45 to be unconstitutional and declaring the new workload policy adopted by CSU to be in "violation of the United States Constitution, Ohio law, and the agreement between AAUP and CSU." AAUP also sought an order enjoining CSU from implementing the new workload policy, and requiring CSU to collectively bargain in good faith concerning the issue of faculty workload.

Pursuant to Civ.R. 65(B)(2), the trial court ordered the trial on the merits of AAUP's claims to be advanced and consolidated with the hearing on AAUP's application for a preliminary injunction. An evidentiary hearing was held in August of 1995 at which extensive testimony and exhibits were presented by the parties. At the time of the hearing, the amended workload policy had not yet been implemented. Instead, AAUP and CSU continued to operate under the terms of the 1991-1994 bargaining agreement. That agreement provided for its continuation beyond its original expiration date so long as the parties continued negotiating toward a new collective bargaining agreement.

At the hearing, CSU introduced the results of studies and reports presented to or by the Ohio Board of Regents, which purportedly showed that between 1980 and 1990 there had been a ten percent state-wide decline in the amount of time spent on undergraduate teaching activities at state-

supported universities, and that during that same period, there had been an increase in the time spent on research activities. CSU argued that R.C. 3345.45, including its collective bargaining ban, was enacted in an effort to reverse that trend.

Evidence was also presented at the hearing that purportedly showed that teaching workload was actually higher at those state universities where collective bargaining took place than it was at those universities that did not have collective bargaining units. AAUP argued that as a result, there was no connection between the statute's collective bargaining ban and the legislature's goal of reversing the decline in teaching activities.

The trial court denied AAUP's request that it declare R.C. 3345.45 unconstitutional and its related request for injunctive relief. Concerning AAUP's equal protection challenge to R.C. 3345.45, the court analyzed the statute under the "rational relation" test to determine whether the classification employed was rationally related to a legitimate governmental interest. The court determined that such a relationship did exist, stating as follows:

> The legislature had a legitimate governmental purpose in the enactment of Ohio Revised Code Section 3345.45. The legitimate governmental purpose is to recapture the ten (10%) percent decline in teaching that had occurred in undergraduate teaching in State four (4) year universities, thereby enhancing the quality of undergraduate education at four (4) year State institutions. Another legitimate governmental purpose is to reallocate faculty attention to teaching and away from research. The legislative purpose also was to ensure that all State four (4) year universities uniformly

implement workload policy consistent with the universities' mission.

The collective bargaining language contained in Ohio Revised Code Section 3345.45 represents a legitimate governmental purpose as it enables the legislature to ensure that the ten (10%) percent decline will be recaptured uniformly by departments with the state universities consistent with each university's individual mission. Ohio Revised Code Section 3345.45 bears a rational relationship to the legitimate government purpose. Ohio Revised Code 3345.45 requires the State universities to implement workload policies designed to recapture the ten (10%)percent decline in instructional teaching. The collective bargaining provision contained in Ohio Revised Code Section 3345.45 ensures that each University will implement the workload policy consistent with the statute.

For two separate reasons, the trial court also rejected AAUP's contention that R.C. 3345.45 violated Ohio constitutional prohibitions against the impairment of contracts. First, the court concluded that the statute was enacted pursuant to the legislature's police power to protect the public health, safety and welfare, and that constitutional prohibitions against impairment of contracts must bow to valid police power legislation. Second, the court also concluded that R.C. 3345.45 was general employee welfare legislation authorized by Article II, Section 34 of the Ohio Constitution. That constitutional provision states:

> Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

Based on the last clause of Article II, Section 34, the court concluded that R.C. 3345.45 superseded any guarantee against impairment of contracts afforded by the Ohio Constitution.

AAUP filed a timely notice of appeal of the trial court's Decision and Final Order and now presents four assignments of error. Pursuant to leave granted by this court, the Ohio Ed cation Association filed an amicus curiae brief urging reversal of the trial court's order. Pursuant to the written consent of all parties, as permitted by App.R. 17, the Ohio Board of Regents filed an amicus curiae brief urging affirmance of the trial court's order.

FIRST ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY RULING THAT R.C. 3345.45 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

AAUP contends that R.C. 3345.45 establishes "two distinct classes: (1) a class of public employees who are entitled to bargain with their employers regarding their workload, and (2) a class of public employees [state university faculty members] who are not entitled to bargain with their employers regarding workload." Brief of Plaintiff-Appellant AAUP, at 13. AAUP contends that this classification violates the Equal Protection clauses of the Ohio and United States Constitutions.

Chapter 4117 of the Ohio Revised Code is entitled "Public Employees' Collective Bargaining." Pursuant to R.C. 4117.03(A)(4):

> (A) Public employees have the right to:
>
> (4) Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements. . . .

Public employees are defined as "any person holding a position by appointment or employment in the service of a public employer," with certain exceptions not applicable here. R.C. 4117.01(C). Included within the definition of a public employer is a "state institution of higher learning." R.C. 4117.01(B).

R.C. 4117.08(A) provides:

> (A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

Further, " . . . this chapter [Ch. 4117] prevails over any and all other conflicting laws, resolutions, provisions, present or

future, except as otherwise specified in this chapter or as otherwise specified by the general assembly." R.C. 4117.10(A).

It is apparent from the foregoing that public employees, as defined by R.C. 4117.01(C), including full-time faculty members at state universities, have the right to collectively bargain over terms and conditions of their employment. However, R.C. 3345.45 has now precluded full-time faculty members at state universities from collectively bargaining over one term and condition of employment, the university's workload policy. To that extent, the effect of R.C. 3345.45 is to establish two separate classes of public employees, those statutorily-defined public employees who have the right to collectively bargain over workload and those statutorily-defined public employees who are precluded from collectively bargaining over workload.

The Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 2 of the Ohio Constitution states that "all political power is inherent in the people. Government is instituted for their equal protection and benefit . . ." Article I, Section 2 of the Ohio Constitution "is the functional equivalent of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.* (1986), 22 Ohio St. 3d 1, 6, 488 N.E.2d 181.

The fact that R.C. 3345.45 creates two separate classifications of public employees does not mean that the statute necessarily abridges the protections afforded by the equal protection clauses of the United States and Ohio Constitutions; it does mean, however, that the statute may

appropriately be subjected to equal protection analysis to determine whether the classification drawn by the legislation violates those constitutional guarantees.

> The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or "draw lines" in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals.

Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure (2d Ed.1992) 7, Section 18.2.

> A classification of persons will not be suspect when the law establishing the classification relates to a legitimate governmental purpose. If the means employed by the law to achieve its ends is the classification of persons who are accorded differing benefits or assessed differing burdens, the law will be tested under the equal-protection guarantee. If the classification does not meet or does not have a sufficient relationship to a required governmental purpose, then the law cannot withstand scrutiny under the Equal Protection Clause. ' * * * Equal protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class. * * * ' *State ex rel. Nyitray v. Indus. Comm.* (1983), 2 Ohio St. 3d 173, 175, 2 Ohio B. Rep. 715, 717, 443 N.E.2d 962, 964.

State ex rel. Doersam v. Indus. Comm. (1989), 45 Ohio St. 3d 115, 120, 543 N.E.2d 1169.

"The standard for determining violations of equal protection is essentially the same under state and federal law." *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St. 3d 351, 353, 639 N.E.2d 31. In determining whether a statute's classification is sufficiently related to a required governmental purpose so as to comply with guarantees of equal protection, courts traditionally have subjected the challenged statute to different levels of scrutiny depending on the group or nature of the right affected by the legislation.

If the classification drawn by the statute affects neither a "suspect class," nor a "fundamental right," then the statute will be subjected only to a minimal level of scrutiny by the courts. Under these circumstances, if the classification employed by the legislature is rationally related to a legitimate governmental interest or objective, the statute does not violate the constitutional guarantees of equal protection. *See State v. Thompkins* (1996), 75 Ohio St. 3d 558, 561, 664 N.E.2d 926; *Fabrey v. McDonald Police Dept., supra*, at 353; *Klepper v. Ohio Bd. of Regents* (1991), 59 Ohio St. 3d 131, 133, 570 N.E.2d 1124. Under this minimal level of scrutiny, or "rational relation" test, "great deference is paid to the state." *State ex rel. Heller v. Miller* (1980), 61 Ohio St. 2d 6, 11, 399 N.E.2d 66. "In the absence of a suspect class or fundamental right, legislative distinctions are invalid only if they bear no relation to the state's goals and no ground can be conceived to justify them." *Fabrey v. McDonald Police Dept., supra*, at 353.

The United States Supreme Court recently summarized the narrow scope of the "rational relation" test as follows:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *See Sullivan v. Stroop*, 496 U.S. 478, 485, 110 L. Ed. 2d 438, 110 S. Ct. 2499 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603, 97 L. Ed. 2d 485, 107 S. Ct. 3008 (1987); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980); *Dandridge v. Williams*, 397 U.S. 471, 484-485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970). Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." *United States Railroad Retirement Bd. v. Fritz, supra*, at 179, 66 L. Ed. 2d 368, 101 S. Ct. 453. This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979)(footnote omitted).

On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, *see Lyng v. Automobile Workers*, 485 U.S. 360, 370, 99 L. Ed. 2d 380, 108 S. Ct. 1184 (1988), and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it," *Lehnhausen v. LakeShore Auto Parts Co.*, 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973) (internal quotation marks omitted). *See also Hodel v. Indiana*, 452 U.S. 314, 331-332, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981). Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd. v. Fritz, supra*, at 179, 66 L. Ed. 2d 368, 101 S. Ct. 453. *See Flemming v. Nestor*, 363 U.S. 603, 612, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960). Thus, the absence of "'legislative facts'" explaining the distinction "on the record," 294 U.S. App DC, at 389, 959 F.2d at 987, has no significance in rational-basis analysis. *See Nordlinger v. Hahn*, 505 U.S. 1, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom

> fact-finding and may be based on rational speculation unsupported by evidence or empirical data. *See Vance v. Bradley, supra*, at 111, 59 L. Ed. 2d 171, 99 S. Ct. 939. *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen, supra*, at 365, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510, 81 L. Ed. 1245, 57 S.

Ct. 868, 109 ALR 1327 (1937)). *Federal Communications Commission v. Beach Communications, Inc.* (1993), 508 U.S. 307, 124 L. Ed. 2d 211, 221-222, 113 S. Ct. 2096, 2101-2102 (footnote omitted).

Conversely, if the classification drawn by the statute affects a "suspect class" or impacts on a "fundamental right," the statute will be subjected to "strict scrutiny" by the court.

> This test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or overriding" end.

> Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary, or narrowly tailored, to promote that compelling interest. Although absolute necessity might not be required, the justices will require the government to show a close relationship between the classification and promotion of a compelling or overriding interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.

Rotunda & Nowak, supra, at 15, Section 18.3.

The "strict scrutiny" test emanated from a footnote in *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 152-153 n. 4, 82 L. Ed. 1234, 1241-1242 n. 4, 58 S. Ct. 778, 782-784 n.4, in which the Court suggested that in those circumstances where constitutionally protected rights were involved, or where the legislation was directed against "discrete and insular minorities," the traditional presumption of constitutionality afforded to legislation may not operate. *See Rotunda* and *Nowak, supra*, at 15, Section 18.3.

Under the strict scrutiny standard of review, the burden is on the state to demonstrate a substantial and compelling reason for the classification chosen. *See Dunn v. Blumstein* (1972), 405 U.S. 330, 342-343, 31 L. Ed. 2d 274, 92 S. Ct. 995. The state must show that the challenged law is "necessary to promote a compelling governmental interest." *Id.* at 342 (emphasis in the original). The burden of justification on the state is a heavy one. *Id.* at 343. The state

must show that the classification "furthers a very substantial state interest." *Id.* In addition, "in pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision;' . . . and must be 'tailored' to serve their legitimate objectives . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' .." *Id.* (citations omitted); *see also In re Griffiths* (1973), 413 U.S. 717, 721-722, 37 L. Ed. 2d 910, 93 S. Ct. 2851.

In determining whether a class is suspect so as to invoke the "strict scrutiny" standard of review, the Court looks to "traditional indicia of suspectness." The Court seeks to determine whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 128, 36 L. Ed. 2d 16, 93 S. Ct. 1278; *see also Plyler v. Doe* (1981), 457 U.S. 202, 216-217 n. 14, 72 L. Ed. 2d 786, 102 S. Ct. 2382. Generally, "laws that classify persons on the basis of either their status as a member of a racial minority or on the basis of their national origin will be deemed suspect and subject to this strict standard of review. The Court has also held that state or local laws which classify persons in terms of alienage, by treating resident aliens less favorably than citizens, will be deemed suspect and subject to this test." *Rotunda* and *Nowak*, *supra*, at 16, Section 18.3.

The United States Supreme Court has also adopted a third level of scrutiny, described as "intermediate scrutiny," in

equal protection cases involving classifications based on gender and classifications based on a person's status as "legitimate" or "illegitimate" at birth. *See Rotunda* and *Nowak*, supra, at 17, Section 18.3; *see also Mississippi University for Women v. Hogan* (1982), 458 U.S. 718, 723-726, 73 L. Ed. 2d 1090, 102 S. Ct. 3331; *Clark v. Jeter* (1987), 486 U.S. 456, 461-462, 100 L. Ed. 2d 465, 108 S. Ct. 1910; *United States v. Virginia* (1996), U.S. , 116 S. Ct. 2264.

Under the "intermediate scrutiny" test, the state has the "burden of showing an 'exceedingly persuasive justification' for the classification . . .. The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi University for Women v. Hogan, supra*, at 724.

Finally, in determining the constitutionality of a statute, courts are required to presume the constitutionality of legislative enactments. *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 10, 539 N.E.2d 103. "Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt." *Arnold v. Cleveland, supra*, at 38-39.

In analyzing the equal-protection challenge to R.C. 3345.45, we must first determine the appropriate level of scrutiny to which the statute must be subjected. We conclude that the class affected by the statute, state university faculty, is not a "suspect class." Our determination as to the appropriate level of scrutiny to apply will thus turn on whether the right affected by the statute, the right to collectively bargain, is a "fundamental right."

Chapter 4117 of the Revised Code, the Ohio Public Employees' Collective Bargaining Act, "falls within the General Assembly's authority to enact employee welfare legislation pursuant to Section 34, Article II of the Ohio Constitution." *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 539 N.E.2d 103, paragraph 2 of the syllabus. Article II, Section 34 states:

> Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and *no other provision of the Constitution shall impair or limit this power*. (Emphasis added).

In *Rocky River, supra*, the constitutionality of Chapter 4117 was attacked on grounds, inter alia, that the statute violated a municipality's power of local self-government to determine the compensation of its safety employees, a power that was guaranteed to municipalities by the "home rule" provisions contained in the Ohio Constitution. The Supreme Court rejected that argument, relying on Article II, Section 34. The Court stated:

> This provision constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons, including local safety forces. *Pension Fund, supra*. The provision expressly states in "clear, certain and unambiguous language" that no other provision of the Constitution may impair the legislature's power under Section 34. *Id.* at 107, 41 O.O. 2d at 412, 233 N.E.2d at 137. This prohibition, of course, includes the "home rule" provision contained in Section 3, Article

> XVIII. *Id.* at 106, 41 O.O. 2d at 411, 233 N.E.2d at 137.
>
> R.C. Chapter 4117, the Public Employees' Collective Bargaining Act, is indisputably concerned with the "general welfare" of employees. Therefore, pursuant to Section 34, Article II, the power of the General Assembly to adopt the Act *may not be affected in any way by the "home rule" amendment*.

Rocky River, supra, at 13 (emphasis in the original); *see also, id.*, at paragraph 2 of the syllabus. *See also State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund* (1967), 12 Ohio St. 2d 105, 233 N.E.2d 135, in which the Supreme Court concluded that legislation regarding the creation of a state-wide pension fund for firemen and police officers was enacted pursuant to the legislature's authority under Article II, Section 34 and that as a result, the legislation prevailed over various constitutional challenges to it.

The breadth of the *Rocky River* holding regarding Article II, Section 34 legislation was emphasized by Justice Wright's dissent in *Rocky River*:

> When we look at the bottom line, the majority has indicated without equivocation that Section 34, Article II of the Ohio Constitution . . . overrides *all* other provisions of the Ohio Constitution.

Rocky River, supra, at 23 (emphasis in the original) (J. Wright dissenting). Justice Wright then reviewed a number of constitutional rights that under the majority's opinion "must

now take a back seat to the 'general welfare' clause noted above." *Id.; see generally id.*, at 23-26.

The majority opinion in *Rocky River*, written by Justice Douglas, also engages in an historical analysis of Article II, Section 34. Justice Douglas first dispels an argument advanced by the appellant in *Rocky River* that Article II, Section 34 was intended to apply only to matters involving a minimum wage. *Rocky River, supra*, at 13-15. Justice Douglas argues that "there can be no question that the purpose of the proposed constitutional amendment was much broader and that the delegates were fully aware of the scope of the amendment under consideration." 43 Ohio St. 3d at 14. Justice Douglas cited to debates in which Judge Dennis Dwyer, a proponent of the provision, stated:

> Therefore, give your employees fair living wages, good sanitary surroundings during hours of labor, protection as far as possible against danger, a fair working day. Make his life as pleasant for him as you can consistent with his employment.

Id., at 15. Justice Douglas also noted that the title of the amendment was "welfare of employees," that even the opponents of the minimum wage provisions generally favored the other provisions contained in the amendment, and that the amendment was adopted by a vote of 96 to 5. *Id.*

Finally, Justice Douglas felt that resort to historical analysis was unnecessary. The language of the amendment was clear and unequivocal. *Id.* The amendment obviously applied to more than just concerns over minimum wage; moreover, the language that "no other provision of the Constitution shall impair or limit" the legislature's power to

pass laws concerning employee welfare was just as clear and unequivocal. 43 Ohio St. 3d at 16.

It seems clear that a right to bargain collectively over one's wages, hours, and terms and conditions of employment that is created pursuant to Article II, Section 34, which would include workload policy, is supreme over at least some legislation enacted pursuant to other powers, if not all. To that extent, the collective bargaining rights conferred by R.C. Chapter 4117, as legislation enacted pursuant to Article II, Section 34, enjoy a status above the status generally afforded statutorily-conferred rights. If the Ohio Constitution is itself a source of rights that are "fundamental," and if legislation enacted under Article II, Section 34 can override at least some, if not all, rights guaranteed by the Ohio Constitution, then the rights conferred by the Article II, Section 34 legislation are themselves arguably "fundamental."

The Ohio Supreme Court has also commented favorably on the benefits afforded by Chapter 4117:

> With the enactment of the Public Employees Collective Bargaining Act, Ohio adopted a comprehensive law to govern labor relations between public employees and their employers. This legislation was long overdue. The Act replaced the outmoded, unworkable and unfair Ferguson Act. By the time the new Act went into effect, Ohio was the fortieth state to have enacted some form of legislation to regulate their public-sector labor relations.
>
> Until the Act went into effect, Ohio had no legal framework governing public-sector labor relations, and dealt with these issues on an ad hoc basis. *Student Project: Public Sector*

Collective Bargaining in Ohio: Before and After Senate Bill No. 133 (1983), 17 Akron L. Rev. 229. This produced an abundance of litigation and controversy and, in fact, there were four hundred twenty-eight public employee work stoppages in Ohio between the years 1973 and 1980. There were no guiding principles which public employers and employees could review in order to structure their conduct in dealing with terms and conditions of employment. Thus, the pre-Act system, if it can be called a system, was an ineffective and costly way to manage public-sector labor relations.

The new Act is a positive step forward. It sets forth firmly defined legal guidelines that minimize the possibility of public-sector labor disputes and provides for the orderly resolution of any disputes that occur. This law brings stability and clarity to an area where there had been none and will facilitate the determination of the rights and obligations of government employees and employers, and give them more time to provide safety, education, sanitation, and other important services. In addition, the Act assures that both public employers and employees will be accorded many of the same rights and be governed by many of the same responsibilities as employees and employers in the non-public sector. In now being treated relatively equally with employees in the private-sector, public employees have been removed from second-class citizenship.

State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd. (1986), 22 Ohio St. 3d 1, 4-5, 488 N.E.2d 181 (footnote omitted); *see also Rocky River, supra*, at 19-20.

The Supreme Court has more recently viewed Article II, Section 34 as not only a source of legislative power, but also a limit on the legislature's power. In *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St. 3d 624, 576 N.E.2d 722, the Ohio Supreme Court was asked to decide the constitutionality of R.C. 4121.80. That statute placed certain restrictions on an employee's intentional tort claim against his employer. In reviewing the constitutional challenge to the statute, the Court first directed its inquiry to "the threshold question of whether R.C. 4121.80, as a whole, transcends the limits of legislative power under the Ohio Constitution." 61 Ohio St. 3d at 633. The Court found that the statute "exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35, Article II of the Ohio Constitution, and is unconstitutional in toto." *Id.*, at paragraph 2 of the syllabus. Concerning Article II, Section 34, the Court stated:

> After careful consideration, we find that R.C. 4121.80 is totally repugnant to Section 34, Article II. Petitioners and their supporting amici set forth the persuasive argument that the statute in issue is not a law that furthers the " ** * comfort, health, safety and general welfare of all employes * * *," and we conclude that this argument is well taken. A legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the " * * *

> comfort, health, safety and general welfare of all employes * * * .".

Id. at 633

From all of the foregoing, it is apparent that legislation passed pursuant to Article II, Section 34 holds a unique position in Ohio. The preferred position of rights conferred by such legislation is grounded in the Ohio Constitution, and such rights are arguably deserving of treatment as "fundamental rights." Moreover, paragraph 1 of the syllabus in *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 616 N.E.2d 163, states:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

It seems clear that when the legislature enacted R.C. 3345.45, it was not attempting to directly exercise its Article II, Section 34 power to comprehensively amend Chapter 4117, the Ohio Public Employees' Collective Bargaining Act. R.C. 3345.45 was a newly enacted statute contained in Amended Substitute House Bill 152, which was passed by the 120th General Assembly in July of 1993. Amended Substitute House Bill 152 included the operating appropriations for the 1993 to 1995 biennium. The bill also amended, enacted, and

repealed hundreds of sections of the Revised Code; however, no provisions of Chapter 4117 were directly amended or repealed by the bill. Moreover, no new sections were added to Chapter 4117 by the bill.

R.C. 3345.45 is contained in Title 33 of the Revised Code, entitled "Education-Libraries." Further, the statute is included in Chapter 3345, entitled "State Universities-General Powers." The legislation was presumably enacted pursuant to the legislature's power to regulate higher education in Ohio. A variety of Ohio constitutional provisions may serve as the source of that power. Article I, Section 7 states:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws . . . *to encourage schools and the means of instruction.* (Emphasis added).

Article VI of the Constitution is entitled "Education." Section 2 of that Article states:

> The general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state; . . . .

Article VI, Section 3 states:

> Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds.

"The word 'school' . . . has acquired a more limited meaning in the public mind as applying only to educational

institutions of the lower or ordinary grades, and, as used in constitutions and statutes, has been frequently defined by the courts as referring only to the public, common schools." 82 Ohio Jurisprudence 3d (1988), 101-102, Schools, Section 1. To that extent, there may be some question as to whether these constitutional provisions referencing "schools" serve as the source of legislative power regarding the regulation of state universities.

The Ohio Supreme Court long ago determined that "the power to establish [state institutions such as colleges] is found clearly granted in the seventh article of the constitution." *Neil v. The Board of Trustees of the Ohio Agricultural and Mechanical College* (1876), 31 Ohio St. 15, 22. The Court was presumably referring to Section 2 of Article VII, which states:

> The trustees of the benevolent, and other state institutions, now elected by the general assembly, *and of such other state institutions, as may be hereafter created*, shall be appointed by the governor . . . (Emphasis added).

The power to create state universities presumably also includes the power to regulate those universities.

Article II, Section 1 of the Ohio Constitution states that "the legislative power of the state shall be vested in a general assembly . . . ". "Under Section I, Article II, . . ., the police power of this state is entrusted to the Ohio General Assembly." *Holiday Homes, Inc. v. Butler Cty. Bd. of Zoning Appeals* (1987), 35 Ohio App. 3d 161, 165, 520 N.E.2d 605. The legislature's police power is the power to enact legislation that bears a real and substantial relation to the health, safety, morals or general welfare of the public. See, *e.g., State v.*

Anderson (1991), 57 Ohio St. 3d 168, 566 N.E.2d 1224, certiorari denied, 501 U.S. 1257, 111 S. Ct. 2904, 115 L. Ed. 2d 1067; *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 146 N.E.2d 854, *certiorari denied* (1958), 357 U.S. 904, 78 S. Ct. 1147, 2 L. Ed. 2d 1155. The legislature's police power to enact legislation related to the general welfare of the public may also be viewed as the source of its power to regulate higher education. Indeed, CSU and the Ohio Board of Regents both argued that the police power was the legislature's authority for enacting R.C. 3345.45.

The foregoing analysis would comfortably support an argument that legislation enacted pursuant to Article II, Section 34 is supreme, and that it therefore prevails over conflicting legislation enacted pursuant to other powers. Plaintiff-Appellant does not rely on a "supremacy" argument, however, but one that claims a denial of equal protection. Nevertheless, our review determines a proper resolution of that argument, as well, because it demonstrates that the qualitative values which attach to legislation enacted pursuant to Article II, Section 34, elevate benefits created thereby to rights which are "fundamental" for purposes of an equal protection analysis. Therefore, a claim that legislation denies members of a discrete class, such as Plaintiffs-Appellants, a benefit afforded to persons outside the class must be resolved on a basis other than the "rational relation" test.

We believe that the trial court should have employed an "intermediate scrutiny" review in order to resolve the equal protection issue in this case. That standard imposes a burden on the state to demonstrate an exceedingly persuasive justification for the classification by showing, at least, that the classification serves important governmental objectives and that the means employed are substantially related to the achievement of those objectives. *Mississippi University For Women v. Hogan, supra*. That level of scrutiny is more

appropriate than the "strict scrutiny" standard because the specific right of which the Plaintiff's class is deprived is one conferred by statute, not one organic to the state or federal constitutions.

Reversal of the trial court's judgment because it employed the wrong standard to resolve the legal issue presented is problematic. Plaintiffs urged the trial court to find that R.C. 3345.45 unconstitutionally denied them equal protection of the law on the basis of the rational relation test. The trial court's error was, therefore, to some extent induced by the Plaintiffs, and they should not be permitted to take advantage of that fact on appeal. *Lester v. Leuck* (1943), 142 Ohio St. 91, 50 N.E.2d 145. *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St. 3d 20, 502 N.E.2d 590. Furthermore, Plaintiffs have not urged us to find that the trial court applied the wrong standard to resolve their equal protection argument, but that the trial court made findings that were incorrect on the standard applied.

App.R. 12(A)(1)(b) requires us to "determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and, unless waived, the oral argument under App.R. 21." (Emphasis added). The alleged error here is that "the trial court erred by ruling that R.C. 3345.45 does not violate the Equal Protection Clauses of the Ohio and United States Constitutions." The assignment of error as stated does not confine itself to any particular equal protection test. In making the determination as to whether the statute violates the equal protection clauses, it would be our obligation to apply the appropriate law to such challenges. Moreover, "an appellate court reviews a question of law de novo; accordingly, it owes no deference to the decision of the trial court." *DeCapua v. Lambacher* (1995), 105 Ohio App. 3d 203, 205, 663 N.E.2d 972.

In addition, "nothing prevents a Court of Appeals from passing upon an error which was neither briefed nor pointed out by a party." *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St. 2d 298, 301, 313 N.E.2d 400. "Under App.R. 12(A), a court of appeals is not required to consider issues not argued in the briefs; however, App.R. 12(A) does not prohibit it from doing so in the exercise of its sound discretion." *Chemical Bank of New York v. Neman* (1990), 52 Ohio St. 3d 204, 207, 556 N.E.2d 490 (emphasis in the original); *see also Garrison Carpet Mills v. Lenest, Inc.* (1979), 65 Ohio App. 2d 251, 254, 417 N.E.2d 1277.

The recent case of *State v. Peagler* (1996), 76 Ohio St. 3d 496, 668 N.E.2d 489, also appears to be particularly relevant to this question. In *Peagler*, the specific issue presented was "whether a court of appeals may reverse a decision of a lower court on a legal theory not raised or considered in the lower court by the parties." *Id.*, at 499. In discussing this issue, the Court stated:

> Generally, an appellate court will not consider any error that counsel could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St. 3d 168, 170, 522 N.E.2d 524, 526, quoting *State v. Childs* (1968), 14 Ohio St. 2d 56, 43 Ohio Op. 2d 119, 236 N.E.2d 545, paragraph three of the syllabus, and citing *State v. Glaros* (1960), 170 Ohio St. 471, 11 Ohio Op. 2d 215, 166 N.E.2d 379, paragraph one of the syllabus; *State v. Williams* (1977), 51 Ohio St. 2d 112, 117, 5 Ohio Op. 3d 98, 101, 364 N.E.2d 1364, 1367; *State v. Lancaster* (1971), 25 Ohio St.

2d 83, 54 Ohio Op. 2d 222, 267 N.E.2d 291, paragraph one of the syllabus.

Likewise, App.R. 12(A)(2) provides that the court of appeals "*may* disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief." (Emphasis added.)

Although this rule allows a court of appeals discretion in deciding to address an issue not briefed or raised below, the court of appeals must base any *factual conclusions* reached upon evidence that exists in the record. *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St. 2d 298, 301, 67 Ohio Op. 2d 358, 360, 313 N.E.2d 400, 403, citing *Paulin v. Midland Mut. Life Ins. Co.* (1974), 37 Ohio St. 2d 109, 66 Ohio Op. 2d 231, 307 N.E.2d 908. Similarly, there must be sufficient evidentiary basis in the record before the reviewing court upon which it can decide a particular legal issue. *Hungler v. Cincinnati* (1986), 25 Ohio St. 3d 338, 342, 25 Ohio B. Rep. 392, 395, 496 N.E.2d 912, 915. Fairness, which is required for the proper operation of the adversary system of justice, requires at least that the parties be allowed in the trial court the opportunity to present evidence that would support or refute the legal theory addressed by the court of appeals.

Id. (emphasis in the original)(footnote omitted).

We conclude that we should not view the error committed by the trial court as beyond our review merely because it was induced by the Plaintiff-Appellant. Constitutional issues are unique, and determinations of them establish precedent in future cases. In that regard, the better alternative is to reject the argument that the error was waived.

We must next determine whether the error determined can be resolved by this court, or whether a remand to the trial court is required. App.R. 12(B) permits us to do either. However, in order to resolve the error ourselves there must be a sufficient basis in the record from which an appellate court can resolve the issue presented. *State v. Peagler, supra*; *Hungler v. Cincinnati* (1986), 25 Ohio St. 3d 338, 496 N.E.2d 912.

We would probably have no difficulty in finding, on the basis of this record, that R.C. 3345.45 and the regulation adopted by CSU on the basis of it serves an important governmental objective, which is the first prong of the intermediate scrutiny test. However, we could not on the basis of this record determine the issue presented by the second prong, which is whether the means employed is substantially related to the achievement of that objective. The evidence concerning the impact of the collective bargaining process on the balance between classroom and non-classroom hours spent by faculty at the state's four-year institutions is decidedly mixed. If classroom hours spent by faculty members has not been materially diminished on account of collective bargaining, then the state may not be able to show that the collective bargaining ban imposed by R.C. 3345.45 is substantially related to the desired increase in the number of classroom hours. Those questions require consideration of issues outside this record; at least, the parties should have another opportunity to address them. Therefore, we could not find that the Defendant is entitled to judgment as a matter of

law, which App.R. 12(B) requires in order for this court to enter judgment in its favor. For that reason, the case will be remanded for further proceedings.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY RULING THAT R.C. 3345.45 DOES NOT UNLAWFULLY IMPAIR PLAINTIFF'S CONTRACT WITH CENTRAL STATE UNIVERSITY, AS WELL AS THE RIGHT TO NEGOTIATE FUTURE CONTRACTS, IN VIOLATION OF ARTICLE I, SECTION 1, AND ARTICLE II, SECTION 28, OF THE OHIO CONSTITUTION, AND ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION.

In this assignment of error, AAUP raises two separate issues. AAUP contends that Revised Code 3345.45 impairs its current collective bargaining agreement with CSU and thus violates Article II, Section 28 of the Ohio Constitution, and Article I, Section 10 of the United States Constitution, which prohibit the legislature from enacting laws that impair the obligations of contracts. Second, AAUP contends that R.C. 3345.45 prevents it from negotiating future collective bargaining agreements and thus violates the right to contract guaranteed by Article I, Section 1 of the Ohio Constitution.

Concerning AAUP's first contention, we fail to see on the record of this case how any of AAUP's current contract rights have been impaired. In its Findings of Fact, the trial court stated:

> 36. The workload policy adopted by the Central State University Board of Trustees has not been implemented by Central State University ("University").
>
> 37. CSU and the AAUP, CSU Chapter, are operating under the terms and conditions of a Collective Bargaining Agreement dated September 1, 1991 through August 31, 1994.

At the time of the August 1995 hearing in this case, the workload provisions contained in Article 19 of the AAUP-CSU collective bargaining agreement apparently remained in effect and thus had not been impaired" by the new workload policy.

Moreover, AAUP's argument fails to consider the effect of the uncodified language contained in Section 84.14 of Amended Substitute House Bill 152 (1993), which states in part:

> Notwithstanding section 3345.45 of the Revised Code, any collective bargaining agreement in effect on the effective date of this act shall continue in effect until its expiration date.

Legislation which is not codified is nevertheless legally binding and is of the same force and effect as codified legislation. *See, e.g. Voinovich v. Bd. Of Park Commrs.* (1975), 42 Ohio St. 2d 511, 330 N.E.2d 434, in which "an uncodified temporary statute" was found not to be in violation of various constitutional challenges. *See also In re McCrary* (1991), 75 Ohio App. 3d 601, 607, 600 N.E.2d 347, in which the court noted that it had the "duty to enforce the uncodified

provisions of [a bill] with the same vigor as a codified statutory provision . . .."

R.C. 3345.45 does state that "notwithstanding division (A) of Section 4117.10 of the Revised Code, any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees." However, when read in conjunction with Section 84.14, it is clear that the legislature did not intend for this provision of R.C. 3345.45 to nullify collective bargaining agreements already in existence. Instead, existing collective bargaining agreements were to "continue in effect" until they expired.

By enacting Section 84.14 of Am. Sub. H.B. 152, the legislature expressed its intent that the above-quoted provision of R.C. 3345.45 have prospective application only. Indeed, Section 84.14 simply affirms what is already the law in Ohio, that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 1.48. When read in conjunction with Section 84.14 of Am.Sub. H.B. 152, R.C. 3345.45 does not impair the obligation of any presently existing contract. Therefore, as a threshold matter, the statute does not violate constitutional prohibitions against contractual impairments.

In addition to arguing that its present contract with CSU has been impaired by R.C. 3345.45, AAUP also contends that the statute prevents it from negotiating future contracts with CSU, in violation of Article I, Section 1 of the Ohio Constitution. That provision states:

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life

> and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Although Article I, Section 1 says nothing on its face about a right to contract, it has been interpreted to guarantee that right. *See, e.g. The Steele, Hopkins & Meredith Co. v. Miller* (1915), 92 Ohio St. 115, 124-126, 110 N.E. 648; *Republic Steel Corp v. Glaros* (1967), 12 Ohio App. 2d 29, 31, 230 N.E.2d 667. However, "nothing is more firmly settled than that the right to contract is not absolute and unyielding, but is subject to limitations and restraints in the interests of the public health, safety and welfare, and these limitations may be fixed by the legislature." *The Steele, Hopkins & Meredith Co., supra*, at 125. To that extent, even if R.C. 3345.45 precluded AAUP from negotiating future contracts, the legislation would not impermissibly violate the freedom of contract guarantee.

AAUP's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY RULING THAT R.C. 3345.45 IS JUSTIFIED AS "GENERAL EMPLOYEE WELFARE LEGISLATION" UNDER ARTICLE II, SECTION 34, OF THE OHIO CONSTITUTION.

The trial court held that R.C. 3345.45 did not violate the constitutional provisions that prohibit a statute from impairing the obligation of a contract. As a part of its rationale, the trial court concluded that R.C. 3345.45 represented general employee welfare legislation enacted pursuant to Article II, Section 34 of the Ohio Constitution. As legislation enacted under that constitutional provision, the court concluded that the statute superseded the constitutional impairment of contract guarantees.

In the previous assignment of error we held that on the record of this case the statute did not impair the obligation of AAUP's presently existing collective bargaining agreement. In view of that threshold determination, it is not necessary that we decide whether the statute can be "justified" under Article II, Section 34 so as to permit an impairment of the obligation of contract. (As we noted earlier, R.C. 3345.45 was not enacted pursuant to Article II, Section 34, but was enacted pursuant to other powers.) Because no contract was impaired by the statute, AAUP's third assignment of error is moot and we, therefore, decline to consider it. App.R. 12(A)(1)(c).

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING PLAINTIFF'S REQUESTS FOR DECLARATORY AND INJUNCTIVE RELIEF.

The trial court concluded that R.C. 3345.45 did not violate the constitutional provisions alleged by AAUP. As a result, it denied AAUP's request for declaratory and injunctive relief.

The resolution of this assignment of error is inter-related with our disposition of AAUP's first assignment of error. Our remand of that assignment of error for application of the appropriate test to AAUP's equal protection claims necessarily requires a remand of this assignment of error, as well. If the trial court concludes on remand that R.C. 3345.45 violates the equal protection clauses of the Ohio and United States Constitutions, it will presumably enter a declaratory judgment to that effect. If the statute is unconstitutional, it will then be necessary for the trial court to consider whether injunctive relief is appropriate.

The fourth assignment of error is sustained.

Conclusion

Having sustained AAUP's first and fourth assignments of error, the judgment of the trial court will be reversed and we will remand this matter to the trial court for further proceedings consistent with this opinion.

WOLFF, J. and FAIN, J., concur.

APPENDIX C

**IN THE COMMON PLEAS COURT OF
GREENE COUNTY, OHIO
CIVIL DIVISION
FILED
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AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS CENTRAL STATE UNIVERSITY CHAPTER	**CASE NO.: 95CV238 JUDGE C. HOWARD JOHNSON**
Plaintiff,	**BY ASSIGNMENT**
vs.	
CENTRAL STATE UNIVERSITY	**DECISION AND FINAL ORDER**

BACKGROUND

The Plaintiff, American Association of University Professors, CSU Chapter ("AAUP"), initially filed a Writ of Mandamus against Central State University ("CSU") in the Ohio Supreme Court challenging Ohio Revised Code Section 3345.45. The Defendant, CSU, filed a Motion to Dismiss which was granted by the Ohio Supreme Court. The Plaintiff, AAUP, CSU Chapter, then filed a Complaint for a Declaratory Judgment which challenged the constitutionality of Ohio Revised Code Section 3345.45 in this Court. The Plaintiff also requested a preliminary injunction enjoining the

Defendant, CSU in response to Ohio Revised Code Section 3345.45. Ohio Revised Code Section 3345.45 provides the following:

> "On or before January 1, 1994, the Ohio board of regents jointly with all state universities, as defined in section 3345.011 (3345.01.1) of the Revised Code, shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for institutions to determine a range of acceptable undergraduate reaching by faculty.
>
> On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section are not appropriate subjects for collective bargaining. Notwithstanding division (A) of section 4117.10 of the Revised Code, any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employee organization and that board of trustees."

FINDINGS OF FACT

1. The Ohio Board of Regents ("Regents"), pursuant to Ohio Revised Code Section 3333.04(A), is responsible for oversight and coordination of higher education in the State of Ohio.

2. The Regents consist of nine (9) Regents who each serve a term of nine (9) years.

3. The chairman of the House and Senate Committees on education also serve as Ex-Officio members on the Board of Regents.

4. The Regents are responsible for the development of public policy for higher education at the State level.

5. The Regents are also responsible for allocation of the State instructional subsidy to the State assisted colleges and universities.

6. The Regents are also responsible for the approval or disapproval of academic programs proposed by the State and independent colleges and universities.

7. The Regents and the Governor of Ohio convened the Managing for the Future Task Force sometime in 1991.

8. The Managing for the Future Task Force ("Task Force") issued a Report in July, 1992 entitled "Managing for the Future: Challenges and Opportunities for Higher Education in Ohio."

9. The Task Force impaneled an Ad Hoc Study Committee on faculty workload.

10. The Ad Hoc Study Committee issued recommendations respecting faculty workload which became a part of the Task Force Report.

11. The Ad Hoc Study Committee and the Task Force concluded that there had been a ten (10%) percent State wide decline in undergraduate teaching activity for the period 1980-1990.

12. There is a statewide need to increase undergraduate education.

13. The Task Force Report contained recommendations to restore the ten (10%) percent decline in the teaching activity.

14. The aim and intent of the Task Force recommendations were designed at significantly improving the quality of the undergraduate education experience through redirecting greater faculty attention and reallocation of faculty resources to undergraduate teaching.

15. The Task Force consisted of representatives from the legislature, education field and industry.

16. The Regents issued a report entitled "Securing the Future" and was in response to the Task Force recommendations respecting faculty workload.

17. The Regents "Securing the Future" report recommendations on faculty workload formed a basis for Amended Substitute House Bill 152.

18. Amended Substitute House Bill 152 entitled "Faculty Workload" was promulgated by the Ohio Legislature as Ohio Revised Code Section 3345.45 and became effective on July 1, 1993.

19. Several studies convened by the Regents and the Governor formed a basis for Ohio Revised Code Section 3345.45.

20. In July, 1993, the Legislative Office of Education Oversight ("LOEO") issued a report entitled, "The Faculty Reward System in Public Universities".

21. The LOEO serves as staff to the Legislative Committee on Education Oversight, which Committee was created by the Ohio General Assembly in 1989 to study education related activities funded wholly or in part by the State of Ohio.

22. The report was requested because the legislators expressed concern about faculty workload.

23. The purpose of the LOEO Report was to give the legislature an understanding of how universities function specifically in the recruitment and reward of faculty members.

24. The LOEO studied the faculty reward system in public universities and described the way this system affects how faculty spend their time.

25. The LOEO Report explained the university norms and incentives which influence a faculty member's decision to focus on research over teaching and service.

26. The LOEO Report concluded that Ohio State universities were consistent with the National trend toward the imbalance of research over teaching at the undergraduate level.

27. The LOEO Report also concluded that elected officials and Regents could be part of a National effort to decrease the emphasis on the prestige of research and focus more on undergraduate education and service to the public.

28. The Ohio Board of Regents ("Regents") Ex-Officio members had the "Securing the Future Report" before enactment of Ohio Revised Code Section 3345.45 and LOEO was studying the workload issue prior to enactment of Ohio Revised Code Section 3345.45

29. The Regents impaneled an Advisory Committee on Faculty Workload Standards and Guidelines in September, 1993.

30. The Regent's Advisory Committee on Faculty Workload Standards and Guidelines was comprised of faculty and administrators from each of Ohio's public universities.

31. A member of Central State University's faculty serves as a representative of the Regents Advisory Committee.

32. The Regent's Advisory Committee on Faculty Workload Standards and Guidelines issued a report that was approved by the Regents on February 18, 1994.

33. Ohio Revised Code Section 3345.45 required the four (4) year universities to implement workload policies consistent with the statute and the Regents guidelines on or before June 30, 1994.

34. CSU established a committee including members from the AAUP CSU Chapter to draft a faculty workload policy consistent with the guidelines mandated by the Regents.

35. Central State University Board of Trustees, in accordance with Ohio Revised Code 3345.45, adopted revisions to its Workload Policy on June 10, 1994. Central State University Board of Trustees, pursuant to the faculty's request, adopted an amended Workload Policy in November, 1994.

36. The workload policy adopted by the Central State University Board of Trustees has not been implemented by Central State University ("University").

37. CSU and the AAUP, CSU Chapter, are operating under the terms and conditions of a Collective Bargaining Agreement dated September 1, 1991 through August 31, 1994.

38. Central State University notified the AAUP that it would not bargain on the issue of faculty workload.

39. The AAUP statewide had opportunity to provide input on House Bill 152 and submitted written testimony to committees at hearings.

40. CSU and AAUP, CSU Chapter, are currently negotiating a new contract.

41. CSU and the AAUP, CSU Chapter, can still bargain and negotiate a wage reopener provision respecting faculty workload.

42. Data published by the Regents in its biennial report called "Basic Data Services" submitted to the Regents by each state university established that there had been a shift at the four (4) year institutions during the period of 1980 to 1990 out of instruction at the undergraduate level into other activities such as research.

43. Data provided by the State universities to the Regents established the ten (10%) percent decline in time allocated to undergraduate teaching during the period of 1980 to 1990.

44. The above referenced data submitted to the Regents established a twenty-two (22%) percent increase in department research for the period of 1980 to 1990.

45. The Regents were concerned that the decrease in instructional teaching at the undergraduate level meant that some state subsidy monies allocated by the general assembly for instruction were being utilized by faculty statewide for department or personal research.

46. Central State University ("CSU") for the period of 1980 to 1990 evidenced a ten (10%) percent decline in weekly contact hours, an overall decrease in student instruction and increase in time devoted to department research.

47. The data respecting CSU was consistent with the trend found at the other state universities for this ten (10) year period of time.

48. The collective bargaining provision included in Ohio Revised Code Section 3345.45 was necessary to ensure the State's ability to recover the ten (10%) percent loss that had occurred in instruction.

49. Faculty workload is bargained independently for each State university.

50. The collective bargaining provision was necessary to achieve consistency across State universities in terms of faculty workload guidelines.

51. The collective bargaining language was necessary to achieve equity in terms of faculty workload by university departmental mission which was necessary in order to recovery the ten (10%) percent loss in instructional teaching or to reallocate the time spent by faculty from research to instructional teaching.

52. Prior to adoption, the Regents Advisory Committee dismissed the issue of how collective bargaining would impact the State's ability to implement the faculty workload policy.

53. The Regents Advisory Committee found at institutions where collective bargaining was in existence considerable variation in faculty workload expectation across the universities in departments that have the same mission. The collective bargaining provision was designed to create uniformity statewide in recapturing the ten (10%) percent decline and reallocating time spent in various activities.

54. The Regents Advisory Committee issued a report in June, 1994 entitled "Report of the Regents Advisory Committee on Faculty Workload: The Evaluation and Reward of Teaching in June, 1994."

55. The report on evaluation and reward was concerned with finding ways statewide to increase the value and recognition of undergraduate teaching.

56. One of the driving forces behind the Regents reports and Ohio Revised Code Section 3345.45 was enhancing the quality of undergraduate instruction.

57. The ten (10%) percent decrease away from instructional teaching at the undergraduate level at State four (4) year universities is consistent with the national decline in teaching and increase in research.

58. All of the State four (4) year institutions submitted workload policies to the Regents as required by Ohio Revised Code Section 3345.45.

59. The Regents have a Uniform Information System in place which tracks whether the ten (10%) percent recapture of instructional teaching at the undergraduate level is being achieved.

60. The CSU Faculty Workload Committee was comprised primarily of faculty members.

61. Ohio Revised Code Section 3345.45 would have an impact on the citizens of the State of Ohio.

62. Ohio Revised Code Section 3345.45 does not increase the work hours of faculty but rather reallocates current time spent by faculty.

63. Faculty workload and quality of education are directly related.

64. The ten (10%) percent decline in teaching represents an aggregate decline in all aspects of teaching including classroom hours, preparation, reviewing work product and student advising.

CONCLUSIONS OF LAW

1. OHIO REVISED CODE SECTION 3345.45 HAS A STRONG PRESUMPTION OF CONSTITUTIONALITY WHICH CAN ONLY BE OVERCOME BY PROOF BEYOND A REASONABLE DOUBT

Ohio Revised Code Section 3345.45 has a strong presumption of constitutionality which can only be overcome by proof beyond reasonable doubt that the legislation and constitution are clearly incompatible. Rocky River v. State Employment Relations Board, 43 Ohio St. 3d, 105, 39 N.E. 2d 103 (1989); State, ex rel Clark v. Brown, Secretary of State, (1965) 1 Ohio St. 2d 121; State v. Anderson of Cuyahoga County, (1967) 9 Ohio St. 2d 159, 161. The Plaintiff has not satisfied that burden. Ohio Revised Code Section 3345.45 is a proper legislative enactment.

2. OHIO REVISED CODE SECTION 3345.45 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF EITEHR THE OHIO OR U.S. CONTITUTION.

Ohio Revised Code Section 3345.45 does not violate the Equal Protection Clause of the Ohio or the United States Constitutions.

"A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or U.S. Constitutions if the classification is rationally related to a legitimate governmental interest." State ex rel Heller v. Miller, (1980) 61 Ohio St. 2d 6, 8; 15 003d 3. Klepper v. Ohio Board of Regents, (1991) 59 Ohio St. 3d 131, 133 (citation omitted). A statutory classification does not violate the Equal Protection Clause of the Ohio Constitution if it distinguishes individuals as dissimilar upon some logical basis. Klepper v. Ohio Board of Regents (1991) 59 Ohio St. 3d 131, 133 (citation omitted).

Ohio was consistent with the national trend and there had been a ten (10%) percent decrease in the effort devoted by faculty to undergraduate teaching. The enactment of Ohio Revised Code Section 3345.45 was the remedy for the deficiency found by the Managing for the Future Task Force and the Ohio Board of Regents and the legislature.

The legislature had a legitimate governmental purpose in the enactment of Ohio Revised Code Section 3345.45. The legitimate governmental purpose is to recapture the ten (10%) percent decline in teaching that had occurred in undergraduate teaching in State four (4) year universities, thereby enhancing the quality of undergraduate education at four (4) year State institutions. Another legitimate governmental purpose is to reallocate faculty attention to teaching and away from research. The legislative purpose also was to ensure that all State four (4) year universities

uniformly implement workload policy consistent with the universities mission.

The collective bargaining language contained in Ohio Revised Code Section 3345.45 represents a legitimate governmental purpose as it enables the legislature to ensure that the ten (10%) percent decline will be recaptured uniformly by departments with the state universities consistent with each university's individual mission.

Ohio Revised Code Section 3345.45 bears a rational relationship to the legitimate government purpose. Ohio Revised Code 3345.45 requires the State universities to implement workload policies designed to recapture the ten (10%) percent decline in instructional teaching. The collective bargaining provision contained in Ohio Revised Code Section 3345.45 ensures that each University will implement the workload policy consistent with the statute.

3. OHIO REVISED CODE SECTION 3345.45 DOES NOT VIOLATE THE IMPAIRMENT OF CONTRACT CLAUSES OF THE OHIO CONTITUTION.

A. Ohio Revised Code Section 3345.45 Represents Valid Police Power Legislation and Bears a Real and Substantial Relation to the General Welfare of the Public and is Neither Unreasonable or Arbitrary.

The State, pursuant to applicable law and the Ohio Constitution, has police power to enact legislation designed to protect public health, safety and welfare. State v. Anderson, 566 N.E. 2d 1224, 57 Ohio St. 3d 168, certiorari denied. Anderson v. Ohio, 111 S. Ct. 2904, 115 L. Ed 2d 1067. The

constitutional provisions against impairment of contracts must bow to valid police power legislation designed to protect public health, safety, and welfare, as long as the exercise of that police power "bears" a real and substantial relation to the public health, safety, morals or general welfare of the public and it is not unreasonable or arbitrary. Ohio Edison Company v. Power Siting Commission of Ohio, (1978) 56 Ohio St. 2d 427.

Moreover, while the Courts may be called upon to weigh public benefit against private burdens and determine whether given legislation constitutes a valid exercise of police power, they will not invalidate that legislation unless the legislating body's initial determination that the law bears a real and substantial relationship to public health, safety and welfare appears to be clearly erroneous. Hudson v. Albrecht, Inc. (1984) 9 Ohio St. 3d 69, 9 OBR 273, 458 NE 2d 352. The judgment of the judiciary is not to be substituted for that of the legislature where an issue is fairly debatable so that reasonable minds may differ. Id at Hudson.

The Ohio legislature in the enactment of Ohio Revised Code Section 3345.45 was utilizing its power to enact general welfare legislation designed to protect the public health, safety and welfare. Specifically, the legislature had valid documentation to determine that the level of instructional teaching at the undergraduate level in the State of Ohio's four (4) year universities had decline over a ten (10) year period (1980-1990). In the exercise of its police power, the legislature made a determination that it was in the best interest of the citizens of the State of Ohio to recapture the ten (10%) percent decline and enhance the quality of undergraduate education. Ohio Revised Code Section 3345.45 was enacted to accomplish that purpose. Ohio Revised Code Section 3345.45 represents a valid exercise of the State's police power and bears a real and substantial

relationship to the public welfare. The legislation specifically requires the universities to develop policies to recapture the documented ten (10%) percent decrease in undergraduate teaching. The legislature allowed the University and the Regents to submit a policy consistent with each individual university's mission, but at the same time accomplish the legislative goal of increasing and recapturing the ten (10%) percent decrease in undergraduate teaching, thereby making the legislation reasonable. The legislation is not arbitrary as it has a specified purpose of recapturing the ten (10%) percent decline and the collective bargaining provision language allows the legislature and Regents to ensure recapture of the ten (10%) percent decline in a consistent fashion within departments of each university.

Collective bargaining is heavily regulated under Ohio law. Parties who contract in heavily regulated areas are presumed to have their eyes open to the potential for legislative modifications of the legal landscape. Energy Reserves Corp. v. Kansas Power and Light Company, 459 U.S. 400, 410 (1983). Ohio Revised Code Section 4117.10(A) [provision contained in the Ohio Public Employees Collective Bargaining Act] provides in pertinent part:

> "This Chapter [4117] prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified by the general assembly." (Emphasis supplied.)

B. Ohio Revised Code Section 3345.45 Represents General Employee Welfare Legislation.

Section 34, Article II of the Ohio Constitution provides the following:

> "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." (Emphasis supplied).

Ohio Revised Code Section 3345.45 entitled Faculty Workload Policy is indisputably concerned with the general welfare of employees. The Managing for the Future Task Force, the Securing for the Future Task Force, The Board of Regents Advisory Committee Report on Faculty Workload and Legislative Office of Education Oversight Report entitled "The Faculty Reward System in Public Universities" all document that O.R.C. Section 3345.45 was concerned with the welfare of the faculty at four (4) year undergraduate state universities.

The power granted the legislature by Section 34, Article II of the Ohio Constitution to enact general welfare legislation supersedes the impairment of contact provision of the Ohio Constitution. Pursuant to Section 34, Article II of the Ohio Constitution, the power of the general assembly to adopt Ohio Revised Code 3345.45 may not be impaired by Article II, Section 28 of the Ohio Constitution which guarantee to the citizens of Ohio the right to enter into contracts. Where the language of a constitutional provision is clear and unambiguous, it is the duty of courts to enforce this provision as written. Blanodini v. Board of Education, (1979) 58 Ohio St. 2d 1, 12 00 139 36 NE 2d 500 Appeal Dismissed (1941), 138 Ohio St. 617 22 00 152, 37 NE 2d 544. The language contained in Section 34, Article II of the Ohio Constitution is clear unambiguous. Ohio Revised Code Section 3345.45 represents general employee legislation and supersedes the impairment of contracts guarantee.

The issue of whether the Plaintiff is entitled to a preliminary injunction is moot as the Plaintiff has outlined herein has not succeeded on the merits.

CONCLUSION

The Court holds that Ohio Revised Code Section 3345.45 in its entirety is constitutional. This statute does not violate the Equal Protection Clause of the United States or Ohio Constitution. Moreover, the statute does not violate the impairment of contract clauses of the Ohio Constitution.

Therefore, Plaintiff's request for injunctive relief is overruled and denied. Also, Plaintiff's request to have Ohio Revised Code Section 3345.45 declared unconstitutional or unlawful is OVERRULED and DENIED.

IT IS SO ORDERED.

S/C HOWARD JOHNSON, JUDGE